APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18833

AMERICAN AIRLINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors.*

No. 18834

TRANS WORLD AIRLINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors.*

No. 18840

UNITED AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors.*

On Petitions for Review of Orders of
The Civil Aeronautics Board

Decided April 15, 1965

* * *

Before BAZELON, Chief Judge, and DANAHER and BURGER, *Circuit Judges.*

BURGER, *Circuit Judge:* Under review are two orders of the Civil Aeronautics Board, one (E 21160) permitting intervenor, Slick Airways, a certificated carrier handling freight only, to put into effect a certain tariff schedule of discounts for blocked space to which the shipper becomes contractually committed and a second order (E 21170) rejecting tariff schedules with tariffs the same as Slick's filed by petitioners, who are also certificated carriers, handling passengers as well as freight.

The effect of the first order, as the Board advises in its brief, "is to permit the Slick tariff to become effective pending an investigation of its lawfulness, and the effect of the subsequent second order is to preclude petitioners [American, Trans World Airlines, Inc. and United Air Lines, Inc.] from providing blocked-space service" such as is permitted for Slick.

At the outset we note that the air cargo transportation business since its inception has been carried on by petitioners, who also carry passengers; at some point two other carriers, The Slick Corporation and The Flying Tiger Line, Inc., intervenors here, became certificated as cargo carriers only. Cargo includes property and mail.

In June 1964 intervenor Slick Corporation, one of the all-cargo carriers, filed with the Civil Aeronautics Board a tariff in which it proposed to offer sizable "blocked space" discounts on transcontinental freight shipments. To qualify for such a discount under the tariff a shipper is required to reserve and contract for a certain amount of space for regular use over a given period; having contracted for the space, the shipper is obliged to pay for it whether used or not.

To Slick's proposed tariff petitioners, the three so-called "combination carriers" (authorized to carry both

passengers and freight on a scheduled basis), filed protests on the ground that the proposed discounts were unlawful under the Federal Aviation Act's ratemaking provisions. In addition, the combination carriers filed "defensive" tariffs substantially identical with Slick's in order to meet Slick's competition, should the Board refuse to suspend Slick's tariff pending investigation of its lawfulness or ultimately find it lawful. The Board first suspended all of the tariffs pending investigation.

Orders Under Review

On August 7, 1964, the Board issued Order E 21160, the first of its two orders here under review. That order vacated the suspension of Slick's tariff while leaving inoperative those of petitioners. As its reason for this action the Board adverted to its simultaneously issued "policy statement," known as Reg. No. PS-24: Pt. 399, "approving the *exclusive* right of all-cargo carriers to sell blocked space to combination carriers, air freight forwarders and large volume shippers." (Emphasis added.)

On August 11 the Board entered order E 21170, the second order under review, rejecting petitioners' tariffs pursuant to its policy statement granting to all-cargo carriers the exclusive right to provide blocked-space discounts and dismissing the investigation of petitioners' tariffs.

Contention of Air Freight Forwarders Association

We deal first with the contention of Air Freight Forwarders Association, an intervenor, that the blocked-space concept approved by the Board's policy statement and the Slick tariff will subject its members to unlawful and uneconomic competition by allowing unauthorized persons to engage in forwarding activities. The Association, as an intervenor, may be heard only on the issues posed by the petitions for review. See, *e.g., Columbia Gas Co.* v.

Amer. Fuel Co., 322 U.S. 379, 383 (1944). Those petitions, as will appear, do not challenge the lawfulness of the Slick tariff; and they challenge the Board's blocked-space regulation only incidentally insofar as it formed the basis of the two orders appealed from. Consequently the questions posed by the Association may not be resolved here.

Mootness of Order E 21160

We accept the Board's informal suggestion of mootness at argument, acquiesced in by the combination carriers, as to the propriety of Order E 21160, which vacated the suspension of Slick's tariff. Under the statute, the Board may suspend a tariff for a maximum of 180 days. That time has now run. Moreover, petitioners' objections to Order E 21160 are in a sense superseded by their objections to Order E 21170, with which we deal fully below. We thus do not reach the questions (1) whether this court may review the Board's different treatment, pending examination of lawfulness, of substantially identical tariffs when the ground for the disparity (as does Reg. No. PS-24: Pt. 399) indicates that the Board has decided to deny certain of the tariffs regardless of their lawfulness;[1] and (2) whether there may exist a basis for distinguishing as to reviewability between initial determinations against suspension and orders vacating prior suspensions.[2]

Validity of Order E 21170

We come finally to Order E 21170, which rejected the proposed tariffs of the combination carriers. Petitioners contend that to allow all-cargo carriers to use blocked-

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[1] The Board argues that Arrow Transp. Co. v. Southern R. Co., 372 U.S. 658 (1962), compels a determination that this order is unreviewable.

[2] See, e.g., Amarillo-Borger Express v. United States, 138 F. Supp. 411 (N.D. Tex. 1956).

space discount tariffs exclusively and deny the same right to combination carriers operates in effect to revoke the authority of the combination carriers to transport property, since, so they assert, the result would be to put them out of the cargo business. Under section 401(g) of the Act, certificated authority may not be revoked except for an intentional violation of the Act, an order, rule or regulation issued thereunder, or a provision of the certificate itself. Revocation may only be after notice and hearing, and must be conditioned on the failure of the carrier to mend its ways within a reasonable period set by the Board. It is undisputed that petitioners have not been put through these revocation procedures.

The Board contends, on the other hand, that no adjudicatory proceedings were necessary, since its regulation was a proper exercise of its rulemaking authority under section 416(a) of the Act. That section provides as follows:

> The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

The Board's policy statement was adopted after rulemaking hearings which the Board tells us led it to believe that its "delineation of roles" of the two categories of carriers would serve the public interest.

In order to find that the Board's action amounts to a revocation of petitioners' certificated authority as cargo carriers, we believe there must be a showing that petitioners would in fact lose a substantial part of their

cargo business, probably to the point where they could not conduct economically feasible operations. There has been no adjudicatory hearing on this question; the rulemaking proceeding did not indicate such a result.

The Board has power to *amend* certificates upon a showing that the public convenience and necessity so require. Such a showing is to be made, after notice, at an adjudicatory hearing. 49 U.S.C. § 1371(g). See *Civil Aeronautics Board* v. *Delta Air Lines,* 367 U.S. 316 (1961). We do not need more evidence than the record reveals to see that the operative effect of the Board's action is to amend the outstanding certificates of petitioners. Indeed the Board concedes the exclusion of petitioners from performing the kind of carriage they were originally certificated to perform and as to which they have made large investments of capital.

The certificates of the all-cargo carriers and those of the combination carriers bestow identical rights and impose identical obligations with respect to the carriage of property. It follows that the two types of carriers must be free to file identical tariffs for the carriage of cargo. By permitting the all-cargo carriers to file blocked-space tariffs the Board acknowledges their present authority to file such tariffs under their existing certificates, which, except as to passenger carriage, are the same as the combination carriers'. By denying the combination carriers the opportunity to file such tariffs the Board in effect amends outstanding certificate authority.

Board Order E 21170 is therefore of no effect because of the Board's failure to hold the hearing required by the Act. No remand on this issue is necessary such as that in *CAB* v. *Amer. Air Transport,* 91 U.S.App.D.C. 318, 201 F.2d 189 (1952), since no issue arises as to the fact of alteration of petitioners' present certificated authority to engage in the same classes of carriage as their long-standing competitors.

FPC v. *Texaco, Inc.*, 377 U.S. 33 (1964),[3] advanced by the Board as supporting its "delineation of roles," is not in point. That case did no more than to uphold the Power Commission's power to provide for summary rejection of contracts with pricing provisions other than those allowed under its regulations. The petitioners there were not being deprived of any authority they had previously exercised; rather, they had submitted applications for certificates of public convenience and necessity which disclosed impermissible pricing clauses. The instant case, in contrast, presents an attempt to abridge existing certificated authority by rulemaking, not the formulation of reasonable, nondiscriminatory criteria to be met as conditions of receiving such authority in the first place. Nor does *Capitol Airways* v. *CAB*, 110 U.S.App.D.C. 262, 292 F.2d 755 (1961), support the Board. The plain implication of that case is rather that where the Board attempts, as here, to separate "sheep from goats" it can do so only by a process of adjudication.

The authorities cited in the dissent do not indicate a contrary result. Indeed, our holding is in full accord with *Great Lakes Airlines* v. *CAB*, 291 F.2d 354 (9th Cir. 1961):

> The question to be determined is whether the terms of such authority . . . were changed adversely to these petitioners by the subsequent action of the Board in adopting the amendatory regulations to which petitioners call attention. If so, adjudicatory proceedings were necessary . . . .

Id. at 366. That case held only that there had been no amendment of carrier authority, as a matter of law, since "the specific prohibitions of the amendatory regulations in question were made for purposes of clarification of

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[3] See generally Comment, 39 N.Y.U.L. Rev. 347 (1964).

practices the Board previously considered violations of the purpose and intent of existing regulations . . . ." *Id.* at 367. The Board, in other words, sought merely to remedy noncompliance with existing binding regulations by promulgation of stricter regulations.

Air Line Pilots Ass'n v. *Quesada*, 276 F.2d 892 (2d Cir. 1960), is even less apposite. That case involved the narrow issue of validity of a rule against pilots' flying scheduled aircraft after age 60; there was no amendment of certificate authority in the sense here involved. The licenses of the pilots specifically provided that their duration was as set out in current regulations. And the Act itself imposes an express duty on the Administrator of the FAA to prescribe reasonable regulations. It was thus in a very narrow and limited context that the court held that an adjudicatory hearing was not required for each pilot.

Cook Cleland Catalina Airways v. *CAB*, 90 U.S.App. D.C. 220, 195 F.2d 206 (1952), similarly provides no warrant for the Board action in this case. We there held that it was proper for the Board to "revoke" petitioner's "license" to operate as an *irregular* carrier under a *blanket exemption* without an adjudicatory hearing, since no such hearing is required by the Act for such exemptions. No one questions that revocation or amendment of the certificated authority of a scheduled carrier may only be the result of an adjudicatory hearing. *Cook Cleland* thus has no bearing on the only question presented here, *i.e.*, whether such revocation or amendment has been attempted by the Board in the guise of rulemaking.

The dissent next suggests that the Board may limit the use of the blocked-space concept to the all-cargo carriers on an experimental basis for some temporary period. But the Board's exclusion does not purport to be temporary; only its oral argument suggests a time limitation. Moreover, even if the challenged action were limited

to an experimental period, that could not justify a breach of the Act by the Board. The Board is not free to embark on extra-legal experimentation at the expense of the Act. Not even "temporary" or "experimental" amendments of existing certificated authority are permitted under the Act without adjudicatory procedures. Since we hold the Board's action here amounts to an amendment, it is illegal however ephemeral. *Nebraska Dep't of Aeronautics* v. *CAB*, 298 F.2d 286 (8th Cir. 1962), relied on by the dissent, is not to the contrary. That case upheld the Board's authorization of a temporary suspension of service without a prior hearing; but Section 401 of the Act, there involved, expressly provides for such action. The section concerns abandonment of certificated routes by carriers. It is correct that abandonment is not to be allowed without a hearing, but Congress explicitly provided "the Board may, by regulations or otherwise, authorize such *temporary suspension* of service as may be in the public interest." 49 U.S.C. § 1371(j). (Emphasis added.) This express authority demonstrates that the *Nebraska Department* case is not in point.

The Board's order E 21170 is therefore vacated and the cases are remanded for action in conformity herewith.

Order vacated and cases remanded.

BAZELON, *Chief Judge,* dissenting: Not every action of the Board affecting a carrier certificate is an "amendment" requiring an adjudicatory hearing.[1] The purpose of such hearing is primarily to protect "what has been called 'security of route'—*i.e.*, providing assurance to the carrier that its *investment in operations* would be protected insofar as reasonably possible." *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S. 316, 324 (1961) (emphasis in original).

Here the Board explicitly found after submission of evidence and oral argument in rule-making proceedings that the combination carriers' present "security of route" would not be affected by excluding them, at least for the present, from the possible expansion of the air freight market through blocked-space reduced rates. The Board stated that reduced rates would primarily attract freight "now moved on surface carriers" and that the diversion to all-cargo carriers of freight presently on combination carriers would not be "significant."

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[1] See *Great Lakes Airlines* v. *Civil Aeronautics Board*, 291 F.2d 354 (9th Cir. 1961); *Air Line Pilots Ass'n, International* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960). Compare *Civil Aeronautics Board* v. *American Air Transport*, 91 U.S. App.D.C. 318, 201 F.2d 189 (1952), which

> "involved an effort by the Board to separate the sheep from the goats: to let the Large Irregular Carriers which had obeyed the spirit and letter of the Board's regulations remain in business undisturbed, while limiting the operations of those which had violated the authority given them. . . . if the Board proposed to discriminate between carriers in the same group, *characterizing some as law abiders and some as law breakers*, it would be required to afford an evidentiary hearing to those whose operating authority was to be suspended or revoked for cause." [*Capitol Airways* v. *Civil Aeronautics Board*, 110 U.S.App.D.C. 262, 265, 292 F.2d 755, 758 (1961) (emphasis supplied).]

Cf. *Cook Cleland Catalina Airways* v. *Civil Aeronautics Board*, 90 U.S.App.D.C. 220, 195 F.2d 206 (1952).

The court's holding—that the Board "amended" the combination carriers' certificates because they can no longer compete on precisely equivalent terms with all-cargo carriers—has only formalistic logic. In practical terms, there is no significant change in the certificates if the carriers will not be financially affected by the Board's action, and the Board has so found. "Needless to say, we are ill equipped to weigh such predictions of the economic future. Nor is it our function to act as a super-commission." *American Trucking Ass'n* v. *United States*, 344 U.S. 298, 309 (1953).[2] I therefore cannot agree that the Board acted arbitrarily here in adopting, without adjudicatory hearing, a policy excluding combination carriers from offering blocked-space reduced rates.[3]

Moreover, the Board maintains that it has excluded combination carriers from offering blocked-space reduced rates only temporarily. It found that any excess cargo capacity on a carrier offering reduced rates would make such rates economically unfeasible for the carrier. It was

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[2] In *Delta Air Lines, supra*, the Supreme Court held an adjudicatory hearing was required to alter Delta's certificate barring flights Delta was then operating. The Board had found that "no significant adverse effect will result" to Delta from the certificate alteration. The Court disregarded this finding, but unlike the present case, the Board had held no hearing whatsoever before altering Delta's certificate and the alteration in itself clearly threatened Delta's present investments. 367 U.S. at 330. Compare *Standard Airlines* v. *Civil Aeronautics Board*, 85 U.S.App.D.C. 29, 177 F.2d 18 (1949).

[3] The Board's action is authorized by § 416(a), Federal Aviation Act, 49 U.S.C. § 1386(a); "The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this subchapter as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this subchapter, to be observed by each such class or group, as the Board finds necessary in the public interest."

thus necessary to restrict the number of reduced rate carriers until the present air freight market expanded. The Board chose all-cargo carriers because of their prior specialization in the market and because "the exclusive role of performing blocked-space service will . . . provide them with a needed source of financial strengthening." The Board expects the air freight market to grow in response to the reduced rates and, by implication, the Board will allow combination carriers to offer these rates when the market has grown sufficiently.

Adoption of this experimental, temporary policy does not require the burdens of an adjudicatory proceeding.[4] But in order to insure that the temporary exclusion of combination carriers from blocked-space reduced rates will not become permanent by default, I would affirm the Board's action without prejudice to the combination carriers' right to reopen the question of their exclusion upon sufficient showing to the Board that their present cargo business was being adversely affected, or that the air freight market had sufficiently expanded so that they could participate in blocked-space reduced rates.

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[4] For inferential support of this proposition, see *Nebraska Dept. of Aeronautics* v. *Civil Aeronautics Board*, 298 F.2d 286, 292-93 (8th Cir. 1962); *R. A. Holman & Co.* v. *Securities & Exchange Comm'n*, 112 U.S.App.D.C. 43, 299 F.2d 127, *cert. denied*, 370 U.S. 911 (1962). In this court, the Board argued:

> "Certainly the Board should not be required to resort to cumbersome certificate amendment proceedings for the purpose of permitting an effective experiment with a new service concept, with the consequence that still further certificate amendment proceedings would be required to effectuate any change in policy or expansion of the number of carriers to provide blocked-space service. On the contrary, the rule-making method represents the more flexible and desirable method of procedure in this area." Respondent's brief at p. 14.

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v.

CIVIL AERONAUTICS BOARD, *Respondent*
THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors*

No. 18834

TRANS WORLD AIRLINES, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors*

No. 18840

UNITED AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors*

On Petitions for Review of Orders of
The Civil Aeronautics Board

ON REHEARING EN BANC

Decided March 2, 1966

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Before: BAZELON, *Chief Judge*, FAHY, WASHINGTON*, DANAHER, BURGER, WRIGHT, MCGOWAN, TAMM and LEVENTHAL, *Circuit Judges*, sitting *en banc*.

LEVENTHAL, *Circuit Judge:* On August 7, 1964, the Civil Aeronautics Board,[1] two members dissenting, issued a "policy statement" regulation (PS-24), providing that only all-cargo carriers may provide "blocked space service"—essentially the sale of space on flights at wholesale rates, when "blocked" or reserved by the user on an agreement to use a specified amount of space.[2] Concomitantly, the Board vacated its suspension of a tariff proposing such blocked space service filed by Slick Airways, one of the all-cargo carriers.[3] Defensive tariffs, similar to but not identi-

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* Circuit Judge Washington became Senior Circuit Judge on November 10, 1965.

[1] Hereafter sometimes referred to as the Board, or CAB.

[2] Regulation No. PS-24, dated August 7, 1964, "Statements of General Policy Blocked Space Service," constituting Amendment 3 to Part 399 of the Board's regulations, contains statements of policy adopted by the Board for the guidance of the public, with certain exceptions. Amendment 3 added to Subpart C (Policies Relating to Rates and Tariffs) a new § 399.37, now codified as 14 C.F.R. § 399.37, defining blocked space as follows:

> "Blocked space service" means the carriage of property in all-cargo aircraft at wholesale rates pursuant to an effective tariff stating a rate applicable only when the user reserves and agrees to pay for a specified amount of space or lift on a regularly recurring basis for a period of not less than 60 days.

[3] Order No. E-21160, August 7, entered in Docket 15419. Appellant American Airlines sought a stay of Order E-21160. At the suggestion of this court, and to enable this court to rule on that motion, the Board, by Order E-21166, August 7, 1964, stayed the effectiveness of Order E-21160 to August 17, 1964. On August 14, 1964, a division of this court issued an order staying the effectiveness of the Board's order pending hearing on the merits. On October 20, 1964, this court granted a petition for rehearing en banc of the order granting a stay, vacated the court order of Au-

cal with Slick's, were filed by American Airlines, Trans-World Airlines and United Airlines,[4] petitioners here, who are combination carriers, i.e. carriers authorized to carry persons as well as property and mail.[5] These tariffs were summarily rejected in Order No. E-21170, August 11, 1964, brought before this court on petitions for review.

The CAB's regulation was the culmination of a rule making proceeding (Docket 14148), held pursuant to notice of January 23, 1964, and supplemental notice of June 22, 1964. All interested parties had opportunity, of which petitioners availed themselves, to present their positions to the Board through oral arguments as well as written data, views, and rebuttals. The procedure followed by the Board admittedly complies fully with the requirements for rule making established in section 4 of the Administrative Procedure Act, 5 U.S.C. § 1003. The question before us is whether this regulation effected a modification of petitioners' existing certificates which, under § 401(g) of the Federal Aviation Act, 49 U.S.C. § 1371(g), may be accomplished only after a full adjudicatory hearing. We hold that the regulation was validly issued.

The Board's policy statements in Regulation PS-24, essentially legislative findings and conclusions in support

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gust 14, 1964, and denied motion for stay. Since the maximum time for suspension of a tariff would in any event have expired before the hearing of this case, the order is now moot and will not be reviewed by this court.

In Order E-21160 the Board directed that the investigation into the lawfulness of the Slick tariff in Docket 15419 should proceed.

[4] The Slick tariff which the Board permitted to go into effect imposed a minimum of 200 pounds for shipments. The defensive tariffs filed by petitioners as to the blocked space arrangement contained no such limitation.

[5] This authority exists by virtue of certificates issued under the statutory "grandfather" provision. Civil Aeronautics Act of 1938, § 401(e), 52 Stat. 988.

of its decision,[6] may be summarized as follows: There is a distinction between combination carriers and all-cargo carriers inherent in their certificates and operating responsibilities thereunder. The reservation of blocked space to all-cargo carriers will further their role as specialists for large volume air freight service in all-cargo aircraft. This can be expected to be followed by a shift of small volume shipments to the combination carriers, whose cargo operations supplement their passenger services and who are better suited for meeting the needs of this category of traffic, at less cost. The blocked space traffic, consisting of traffic produced by frequent, regular and high volume shippers, has particular need for a specialized type of service marked, among other things, by low rates, appropriately convenient schedules and assurance that space will be available when needed. A large market of traffic now moved on surface carriers will become available if air carriers achieve a breakthrough in properly servicing such traffic—a breakthrough dependent on development of marketing and performance techniques adapted to serving the peculiar needs of these shippers, and dependent on attraction of high volume of traffic through rate reduction, in turn made possible by improved planning and efficiency.

The Board considered that its statutory responsibility to promote air transportation required it to pursue earliest possible achievement of the breakthrough, and that this depended on assigning the exclusive role of perfecting blocked space service to the specialized all-cargo carriers.

Of particular interest and significance were the following findings and conclusions:

> However, the needed improvement in equipment utilization and load factors cannot be obtained if the

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[6] We use the term "legislative findings and conclusions" to avoid confusion with the "findings and conclusions" required by § 8(b) of the Administrative Procedure Act for adjudications and rules required to be made on the record after opportunity for agency hearing.

traffic from blocked space arrangements is spread too thinly among carriers. Thus, if the blocked space concept is to be given a true test, we must make sure that excessive blocked space capacity is not offered. For this reason in particular, our policy contemplates that only the all-cargo carriers will be permitted to offer blocked space service at this time.

Assigning the all-cargo carriers the exclusive role of performing blocked-space service will, we believe, provide them with a needed source of financial strengthening. We recognize, of course, that some traffic now moving on the cargo services of the combination carriers may be diverted to the blocked space services of the all-cargo carriers, but we do not believe that such diversion would be significant. Moreover, these carriers can be expected to acquire an increasing share of small package shipments. Some traffic now moving on the all-cargo carriers at regular rates will be diverted to their lower blocked space rates. However, there is no reason to believe that attractive blocked space rates and the benefits of specialization will not ultimately bring about an increase in traffic more than offsetting any such diversion.

1. Petitioners say that the Board has no power by summary action, without hearing, to prevent a carrier or group of carriers from competing fully with other carriers. Their reliance on a "fundamental principle" that carriers should be able to compete with each other, though couched here in procedural terms, has overtones of an argument on the merits. At the outset we reject the sweeping argument, if that argument is being made or implied, that such agency action would be invalid even if taken after the most elaborate of procedures. That competitors in a regulated industry should be treated similarly in rate rulings in order to preserve competition is not denied. But that is not to say that reasonable distinctions between

groups of competitors are impermissible, and that different services and rates may not then be authorized for the different groups or classes. Congress made a broad delegation of power to the Board, in § 416(a) of the Act (49 U.S.C. § 1386(a)), to "establish such just and reasonable classifications or groups of air carriers . . . as the nature of the services performed by such air carriers shall require."

Petitioners have made no presentation that the Board's distinction between combination carriers and all-cargo carriers is meaningless or without rational foundation. Congress has given the Board not only a wide regulatory authority, but a specific promotional function to initiate proposals for the purpose of expanding efficient civil aviation transport;[7] the power to classify carriers and service; and the power to issue implementing rules and regulations.[8] This combination of powers, together with the underlying findings and conclusions, suffices to sustain the regulation on the merits, assuming no procedural bar. See generally *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

2. Petitioners claim that § 401(g) of the Federal Aviation Act, 49 U.S.C. § 1371(g), assures them an "adjudicatory hearing" because the Board action amounts to a modification or suspension of existing rights under their certificates of public convenience and necessity.

In essence, petitioners' argument is the same as the thesis this court accepted ten years ago in the *Storer* case,[9] only to be reversed by the Supreme Court.[10] This

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[7] 49 U.S.C. §§ 1302(a) and (f), and 1303(b).

[8] 49 U.S.C. § 1354(a).

[9] *Storer Broadcasting Co.* v. *United States*, 95 U.S. App. D.C. 97, 220 F.2d 204 (1955).

[10] *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

court held the multiple ownership rule of the Federal Communications Commission invalid because of the inadequacy of the rule making procedure followed in its adoption, an adjudicatory hearing being expressly guaranteed by statute to applicants for licenses. The Supreme Court, however, held that notwithstanding the statutory hearing requirement the Commission retained the power to promulgate rules of general application consistent with the Act, and to deny an adjudicatory hearing to applicants whose applications on their face showed violations of the rule. *Storer's* vitality is attested by its recent application in *FPC* v. *Texaco*, 377 U.S. 33, 39 (1964),[11] where the Supreme Court stated:

> The statutory requirement for a hearing does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived.

Petitioners argue that the *Storer* doctrine is restricted to regulations affecting future applications for new licenses or certificates, whereas here the CAB regulation affected rights under existing certificates. That such a restrictive reading of the *Storer* doctrine is unwarranted, is shown by such decisions as *National Broadcasting Co.*

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[11] The Federal Power Commission had validly adopted a rule prohibiting certain pricing provisions in the rate schedules of independent producers of natural gas, and had summarily rejected applications for certificates of public convenience and necessity which contained rate schedules with provisions running afoul of the Commission's rule. The Court of Appeals for the Tenth Circuit held that the rule could not be applied to deprive a certificate applicant of the adjudicatory hearing guaranteed him by § 7 of the Natural Gas Act. 276 F.2d at 896. The Supreme Court reversed. See, generally Davis, 2 *Administrative Law* § 15.03 (1958).

v. *United States*, 319 U.S. 190 (1943);[12] *Air Lines Pilots Ass'n* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960);[13] and *Capitol Airways, Inc.* v. *CAB*, 110 U.S.App.D.C. 262, 292

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[12] *National Broadcasting Co.* upheld the validity of regulations applicable to radio stations engaged in chain broadcasting. The regulations were issued in 1941 after an investigation and legislative hearings appropriate for rule making (see 319 U.S. at 194-95), but not the adjudicatory-type hearing prerequisite under the Communications Act, even prior to the Administrative Procedure Act, for denial of a license application or modification or non-renewal of license, see *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327, 332 (1945). The regulation required radio station licensees engaged in chain broadcasting to alter long-standing business practices—e.g. precluded network affiliation contracts for a term longer than two years—to avoid revocation or at the very least non-renewal of licenses. But the court found (p. 225) that there was "no basis for any claim that the Commission failed to observe procedural safeguards required by law."

[13] The Court upheld the promulgation, without adjudicatory hearings, of a Federal Aviation Agency regulation barring individuals sixty years old from serving as pilots, even though that regulation modified rights under all outstanding licenses and effected a termination without hearing of some outstanding licenses. Rejecting a challenge by pilots relying on the statutory provision, 49 U.S.C. § 1371(g), that an adjudicatory hearing must be provided before an airman's license may be revoked or amended, the court stated (276 F.2d at 896):

> The Administrator's action does not lose the character of rule-making because it modifies the plaintiff pilots' claimed property rights in their licenses and their contractual rights under collective bargaining agreements . . . Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation.

F.2d 755 (1961).[14] See also *Transcontinental Television Corp.* v. *FCC*, 113 U.S.App.D.C. 384, 308 F.2d 339 (1962).

The present case is different in particular aspects of the facts or statutory provisions from *Storer* and the other *Storer* doctrine cases. However, the *Storer* doctrine is not to be revised or reshaped by reference to fortuitous circumstances. It rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

3. The need for and importance of policy rule making made on the basis of a procedure appropriate thereto is clearly identified in the Administrative Procedure Act (APA), 5 USC § 1001 et seq. In general, the APA establishes a dichotomy between rule-making and adjudication. For adjudication a formal system is provided.[15]

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[14] *Capitol Airways* upheld a CAB order amending its rules so as to require "supplemental" air carriers serving military installations to apply for individual exemptions from restrictions on their preexistent operating authority, rather than enjoying a blanket exemption previously in effect under the Board's rules. The court held that this action could be effected without a hearing, although the Board "has redrawn the rules of the game" in such a way that some competitors will survive while others will not. 110 U.S.App.D.C. at 265, 292 F.2d at 758.

[15] Section 5 of the APA in substance provides that the officers who receive the evidence shall make an initial decision, or at least a recommended decision, and prohibits any officer engaged in investigating or prosecuting functions from participating in the decision. It protects the right of cross-examination and the right of presenting oral testimony.

Rule making, however, is governed by § 4, which essentially requires only publication of notice of the subject or issues involved, an opportunity for interested persons to participate through submission of written data, and the right of petition in respect of rules. These more limited requirements are geared to the purpose of the rule making proceeding, which is typically concerned with broad policy considerations rather than review of individual conduct. Compare the Attorney General's Manual on the Administrative Procedure Act (1947), pp. 14-15:

> The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. Senate Hearings (1941) pp. 657, 1298, 1451. Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action.
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> * * * *
>
> Not only were the draftsmen and proponents of the bill aware of this realistic distinction between rule making and adjudication, but they shaped the entire Act around it.

Rule making has a unique value and importance as an administrative technique for evolution of general policy, notwithstanding, or perhaps indeed because of, the freedom from the procedures carefully prescribed to assure fair-

ness in individual adjudication. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202, 203 (1947).[16]

The regulation under discussion, being an "agency statement of general . . . applicability and future effect designed to implement . . . or prescribe law or policy," plainly satisfies the definition of "rule" in § 2(c) of the APA,[17] as well as general understanding. There is therefore a presumptive procedural validity for the rule making procedure prescribed in § 4 of the APA, unless countermanded by a different Congressional mandate.

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[16] *Chenery* recognizes that an agency may have the discretion to determine how to proceed. The objective of pursuit of the "rule of law" in the administrative process, through development of relatively clear and informative public standards, can be achieved either through rule making or the case-by-case adjudicatory system.

For some statements reviewing the relative advantages and disadvantages of rule making procedures as opposed to adjudication for the development of agency policy, and concluding that increased use of rule making is in the public interest, see e.g. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (1962); Shapiro, *The Choice of Rule Making or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965); Baker, *Policy By Rule or Ad Hoc Approach—Which Should it Be?* 22 Law & Contemp. Prob. 658 (1957).

Judge Friendly in effect suggests (p. 105) that the case-by-case technique as utilized by the CAB has muddied the waters and operated to avoid an overall policy statement of approach to the route structure.

[17] 5 U.S.C. § 1001(c) defines "rule" as meaning "any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." Professor Davis points out that the words "or particular" were inserted after Senate passage in order, said the House Committee, to "assure coverage of rule making addressed to named persons," that the words were not intended to change into rule making what was previously considered adjudication but "to make sure that what has traditionally been regarded as a rule will still be a rule even though it has particular instead of general applicability." 7 Davis, *supra* note 11, § 5.02.

4. Serious questions have been raised concerning the adjudicatory-type hearings required and held on initial licensing involving specific carriers and routes. It has been suggested that air line certificates are an instance where "functions that are more truly planning than adjudicatory have been forced too rigidly into the latter mould," and that officials engaged in planning functions should be "free to use flexible procedures in the search for ideas and policies" rather than be "bound either as a matter of routine or law to pursue procedures ill-adapted for the performance of such a function."[18]

The difficulties currently experienced in the administrative process, sometimes referred to as its "malaise," obviously do not warrant departure from procedures mandated by Congress. But they suggest the need for relative certitude before a court concludes that adjudicatory procedures are required. The need for certitude is underscored if the adjudicatory procedure is to be required on the ground that the proceeding involves an amendment of licensing, for under the Administrative Procedure Act that conclusion results in even more rigorous procedural requirements than apply to initial licensing. Thus, the examiner would not even be free to consult with agency technicians, as he is on initial licenses. And the presentation to the agency heads would have to await an examiner's report and proceed on the basis of exceptions thereto, whereas in initial licensing the agency may omit

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[18] Landis, *Report on the Regulatory Agencies to the President-Elect*, p. 18 (1960).

A leading practitioner before the CAB has even suggested that the breakdown of the administrative process in protracted cases should be overcome by the adoption of a conference-hearing procedure, with virtual elimination of oral testimony, including cross-examination, and hearings confined in substance to conference discussions between lawyers and expert witnesses. Westwood, *Administrative Proceedings: Techniques of Presiding*, 50 A.B.A.J. 659 (1964).

the examiner's report and proceed on the premise that exceptions can be more clearly focused in the light of proposals and views of the senior staff officials. In short, the rigors of the adjudicatory procedure could not even be softened by the exceptions deliberately provided by Congress in the APA in cases of initial licensing (and rule making on the record) in order to provide the flexibility requisite for proceedings principally involving policy determinations.[19]

5. We are not here concerned with a proceeding that in form is couched as rule making, general in scope and prospective in operation, but in substance and effect is individual in impact and condemnatory in purpose. The proceeding before us is rule making both in form and effect. There is no individual action here masquerading as a general rule. We have no basis for supposing that the Board's regulation was based on a sham rather than a genuine classification. The classes of carriers were analyzed both functionally and in terms of capacity for furthering the promotional purposes of the Act. The class of combination carriers is not accorded the same rights as the class of all-cargo carriers, but the difference is in no sense a punishment for sins of commission or omission. They are not, in Judge Washington's phrase, "goats" being separated from favored sheep.[20]

6. Petitioners' contention is not advanced by *CAB* v. *Delta Airlines*, 367 U.S. 316 (1961). Once the Supreme Court made clear that the original certificate order had become final, it was undisputed that the second order,

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[19] See Attorney General's Manual on the Administrative Procedure Act, p. 15 (1947).

[20] *Capitol Airways, Inc.* v. *CAB*, 110 U.S.App.D.C. 262, 265, 292 F.2d 755, 758 (1961). What Judge Washington had in mind was the use of rules as a guise for imposition of sanctions on some parties for violations of the Act, not the kind of distinctions made by the Board here.

addressed to the one carrier (Delta) and prescribing for it a less favorable route than the original order, was an amendment of a certificate for which an adjudicatory hearing is requisite under § 401(g) of the Federal Aviation Act. The "security of route" principle thus gives protection to an individual carrier that has made an investment in order to carry on the certificated service, assuring it that the CAB will not worsen its position by action addressed against it individually, by prescribing inferior routes. Since the Supreme Court gave no indication in *Delta* that it intended to depart from the *Storer* doctrine, we see no basis for reading *Delta* as implying that the mere fact that licenses will be affected renders general rule making an impermissible means of agency action governing all carriers, or an appropriate general class of carriers.

Where the agency is considering an order against a particular carrier or carriers there is protection through the requirement of the adjudicatory procedure appropriate for such individual actions and amendments, a requirement which *Delta* warns will be strictly enforced. Where the agency is considering a general regulation, applicable to all carriers, or to all carriers within an appropriate class, then each carrier is protected by the fact that it cannot be disadvantaged except as the Board takes action against an entire class. For any such class regulation there is also protection outside the field of procedure in that the general regulation must be reasonable both as to the classification employed, and as to the nature and extent of the restriction in relation to the evil remedied or other general public purpose furthered.

7. There may be wisdom in providing for oral testimony, at least in legislative-type hearings, in advance of the adoption of controversial regulations governing competitive practices, even though the need for development

of overall requirements precluded Congressional requirement of such hearings for rule making generally.[21]

This court has indicated its readiness to lay down procedural requirements deemed inherent in the very concept of fair hearing for certain classes of cases, even though no such requirements had been specified by Congress. *Gonzalez* v. *Freeman*, 118 U.S.App.D.C. 180, 334

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[21] Compare pp. 107-08 of the Final Report of the Attorney General's Committee on Administrative Procedure (S.Doc. 8, 77th Cong., 1st Sess.) (1941):

> [Hearings] are now generally held in connection with the fixing of prices and wages, the prescription of rules for the construction of vessels and other instruments of transportation, the regulation of the ingredients and physical properties of food, the prescription of commodity standards, and the regulation of competitive practices. The regulation of all of these matters bears upon economic enterprise and touches directly the financial aspects of great numbers of businesses affected, either by imposing direct costs or by limiting opportunities for gain. Appreciation of these effects, both by businessmen and government officials, seems to be the chief cause of the increased use of hearings in administrative rule making.
>
> The Committee believes that the practice of holding public hearings in the formulation of rules of the character mentioned above should be continued and established as standard administrative practice, to be extended as circumstances warrant into new areas of rule making. The difficulty of defining necessary exemptions from any general prescription argues strongly, however, against the wisdom or feasibility of a statutory requirement that hearings invariably precede promulgation of a regulation. . . . Here, as elsewhere in the administrative process, ultimate reliance must be upon administrative good faith —good faith in not dispensing with hearings when controversial additions to or changes in rules are contemplated.

F.2d 570 (1964); *Pollack* v. *Simonson*, —— U.S.App.D.C. ——, 350 F.2d 740 (1965).[22]

However in the present case the CAB did not limit itself to minimum procedures, but rather gave the parties a significantly greater opportunity to persuade and enlighten the Board. It provided not merely for written comment, but in addition for oral argument.[23] The CAB, presumably with the aid of its policy staff, sifted out the dross and delineated key questions on which argument could most helpfully be focused, including the question material to the case at bar.

If additional procedural safeguards are to be imposed as a requirement it would be more salutary to incorporate them into a rule making procedure than to adopt a blanket requirement of an adjudicatory procedure. A rule making setting would better permit confinement of oral hearings to the kind of factual issues which can best be determined in the light of oral hearings, without undue elongation of the proceeding or sacrifice of the expedition and flexibility available in rule making. It would also permit the

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[22] Compare S.Rep.No. 752, 79th Cong., 1st Sess. p. 18 (1945); Administrative Procedure Act, Legislative History, p. 204 (S. Doc. No. 248). The Senate Judiciary Committee, while according to initial licensing certain exceptions from procedural requirements generally applicable to adjudicatory determination "upon the theory that in most licensing cases the original application may be very much like rule making," observed that some cases "tend to be accusatory in form and involve sharply controverted factual issues. Agencies should not apply the exceptions in such cases, because they are not to be interpreted as precluding fair procedure where it is required."

[23] Opportunity for oral argument to the board is not necessarily requisite even in adjudicatory proceedings, *NLRB* v. *Clausen*, 188 F.2d 439 (3rd Cir.), *cert. denied*, 342 U.S. 868 (1951). Whether it is required by due process depends upon the circumstances. *FCC* v. *WJR, The Goodwill Station*, 337 U.S. 265, 276 (1949).

hearing examiner to confer with experts and the Board concerning "legislative facts" and policy questions.

However, there is no basis on the present record for concluding that additional procedures were requisite for fair hearing. We might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay. Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kind of facts they proposed to adduce, and by what witnesses, etc. Nor was there any specific proffer as to particular lines of cross-examination which required exploration at an oral hearing.[24]

The particular point most controverted by petitioners is the effect of the CAB regulation on their business. The issue involves what Professor Davis calls "legislative" rather than "adjudicative" facts.[25] It is the kind of issue

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[24] A request for cross-examination is generally of less value when not coupled with a proffer of direct proof, see Westwood, *supra* note 18.

Petitioner United stated in its comments that "if the Board accepts the conclusions of its staff predicated as they are on inaccurate and untested cost estimates, the combination carriers will be penalized and their right to operate all-cargo aircraft somehow impaired." Disputes as to costs frequently involve judgment as to cost allocations, and in such matters, as Justice Brandeis noted long ago, "experience teaches us that it is much easier to reject formulas presented as being misleading than to find one apparently adequate." *Groesbeck* v. *Duluth, S.S. & A.R. Co.*, 250 U.S. 607, 614-15 (1919).

[25] See 1 Davis, *Administrative Law* § 7.02, p. 413 (1958):

> Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

involving expert opinions and forecasts, which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings.

It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience. Although the CAB's regulation is not temporary in the sense of being expressly limited in duration, the Board's findings plainly reflect its assumption that the regulation was intended to be subject to re-examination.[26] The Board's regulations provide that "any policy may be amended from time to time as experience or changing conditions may require." 14 C.F.R. § 399.4. In any event, it is the obligation of an agency to make re-examinations and adjustments in the light of experience.[27]

To avoid any possible misapprehension, our affirmance of the Board's action is without prejudice to the right of the combination carriers to reopen the question of their exclusion upon a showing that the Board's assumptions could not reasonably continue to be maintained in the light of actual experience, that their overall cargo business was significantly impaired, or that the air freight market had sufficiently expanded so that the promotion

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[26] Thus the Board noted its conclusion that expansion to combination carriers was not feasible "at this time." In the accompanying order permitting Slick's tariff to go into effect, the Board stated: "We believe that Slick is proposing a worthwhile experiment which should be tested in the market place. . . . Permitting Slick's tariff to go into effect now will also provide the Board with experience data upon which we may better gauge the effect of the blocked space service during the course of the ensuing investigation." Order No. E-21160, August 7, 1964.

[27] See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225 (1943); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

of the air cargo industry through blocked space reduced rates would not be imperiled by their participation.

Since our records show that this Court took action more than a year ago to permit the regulation to become effective (see note 3 *supra*), it should perhaps be mentioned that at the argument respondents stated that thus far there had been little blocked space traffic and no significant diversion from petitioners. Petitioners replied that this period has not been a fair test, since the all-cargo carriers may have been awaiting the outcome of the litigation before aggressively exploiting their newly won privileges. It suffices to say that if and when petitioners have a showing to make based in significant measure on actual relevant experience, they will have a remedy available to vindicate their asserted rights, both before the Board and on judicial review in case of dissatisfaction with the Board's action or inaction.

Meanwhile they have been accorded a hearing conforming to and surpassing the minimum required for rule making. They have not been subject to a denial of procedural rights that undermines the validity of the regulation.

Affirmed.

WASHINGTON, *Senior Circuit Judge*, did not participate in this decision.

BURGER, *Circuit Judge*, with whom DANAHER and TAMM, *Circuit Judges*, join, dissenting: Petitioners, three airlines authorized to carry both passengers and cargo on a regular basis, hold certificates for cargo carriage legally identical with the certificate held by Intervenor, Slick Corporation, an all-cargo carrier. Without holding the adjudicatory hearing required by statute before an outstanding certificate may be amended,[1] the Civil Aeronautics Board laid down what it described as a "regulation" allowing all-cargo carriers — but no others — to offer reduced rates for "blocked-space" shipments; it expressly excluded combination airlines such as Petitioners from the benefits of offering the same reduced-rate service.

Acting under this "regulation" the Board issued the order under review, specifically denying applications of Petitioners to offer the same service Slick had been authorized to offer. These actions were taken in response to Slick's request, over the opposition of its fellow all-cargo carrier, Flying Tiger Line, that the Board "delineate the roles" of combination and all-cargo carriers[2] in such

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[1] Federal Aviation Act of 1958, § 401(g), 72 Stat. 756, 49 U.S.C. § 1371(g) (1964); see C.A.B. v. Delta Air Lines, 367 U.S. 316 (1961).

[2] The Board purported to find authority for this delineation in section 416(a) of the Act, 72 Stat. 771, 49 U.S.C. § 1386(a) (1964), which provides:

> The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

The Board's "Policy Statements," described in the majority's footnote 2, asserted the following justification for its action:

> A logical means of further delineating the role of the all-cargo carriers is *to foster their development* as specialists for

a way as to make the all-cargo carriers the "wholesalers" and the combination carriers the "retailers" of air cargo space. I have trouble seeing how a "regulation" which turns identical certificates into ones which place the licensees in entirely distinct carrier roles, carrying different types of cargo for different types of shippers, can be said to be anything less than an amendment of outstanding certificates. This much is clear, for it is undisputed that after the "regulation" Petitioners could not lawfully engage in the same carriage as their all-cargo competitors. Indeed the Board concedes that its action has excluded Petitioners from performing the kind of carriage which they were originally certificated to perform and in which they have made large investments of capital. I therefore dissent from the majority's conclusion that an adjudicatory hearing was not required. As I see it this is nothing more than a transparent device to favor some carriers at the expense of others.

The certificates of the all-cargo carriers and those of the combination carriers bestow identical rights and impose identical obligations with respect to the carriage of property. It follows that the two types of carriers must be free to file identical tariffs for the carriage of

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large volume air freight service in all-cargo aircraft. The reservation of blocked space arrangements exclusively to the all-cargo carriers is consistent with this objective. The increased concentration of the all-cargo carriers on large volume traffic can be expected to be followed by a shift of small volume shipments to the combination carriers, *whose cargo operations supplement their passenger services* and who are better suited for meeting the needs of this category of traffic and at less cost.

(Emphasis added.) In light of this statement, it should be remembered that the all-cargo airlines carry about 15 per cent of the nation's scheduled domestic airfreight, while the combination carriers carry 85 per cent. Of such freight transported in all-cargo airplanes, the all-cargo lines carry 36 per cent, and the combination lines 64 per cent.

cargo. By permitting the all-cargo carriers to file blocked-space tariffs the Board acknowledges their present authority to file such tariffs under their existing certificates, which, except as to passenger carriage, are the same as those of the combination carriers. By denying the combination carriers the opportunity to file such tariffs the Board in effect amends outstanding certificate authority. *Cf. FCC* v. *National Broadcasting Co. (KOA)*, 319 U.S. 239 (1943).

The majority opinion cites a number of cases in an effort to sustain its holding that the Board has authority to amend Petitioners' certificates by rulemaking rather than an adjudicatory procedure. Those cases are not in point. First, most of them dealt with agencies other than the CAB. The Supreme Court said recently in another context, "federal agencies are not fungibles . . . —Congress has treated the matter with attention to the particular statutory scheme and agency." *UAW* v. *Scofield*, 382 U.S. 205, 210 (1965).[3] We are dealing here with a statute motivated in large part by concern for "security of certificate." *CAB* v. *Delta Air Lines*, 367 U.S. 316, 322 n.6, 324-25 (1961). This concern is reflected in the section 401(g) requirement of an evidentiary hearing before a certificate may even be amended. Second, none of the cases relied on by the majority deals with a situation like that before us, where an agency attempts by rulemaking to amend some—but not all—of the outstanding certificates authorizing a particular kind of service so as to deprive the licensees of a significant part of their license authority.

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[3] This distinction is particularly applicable to Transcontinent Television Corp. v. FCC, 113 U.S.App.D.C. 384, 308 F.2d 339 (1962), cited by the majority, which dealt with the very different legislative situation of broadcast station license renewals under the Communications Act of 1934, which gives the FCC broad powers to make frequencies unavailable by rule amendment.

United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), upon which the majority chiefly relies, as well as *FPC* v. *Texaco*, 377 U.S. 33 (1964),[4] and *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943),[5] are cases dealing with rulemaking applying *across the board* to all *applicants* for licenses or certificates. Petitioners there were not being deprived of any authority they had formerly exercised; in those cases rulemaking was used to formulate reasonable, nondiscriminatory criteria to be met as conditions of receiving certificates in the first place. By contrast, the present appeal involves a use of rulemaking to abridge existing certificates to give favored carriers a monopoly on certain classes of carriage for the express purpose of "foster[ing] their development" at the expense of others not so favored. These differences are not "fortuitous circumstances" recognition of which leads to "revising" or "reshaping" the *Storer* doctrine, as the majority suggests. They are basic not only to the statute but also to the question of the appropriateness of rulemaking procedures, as I will show.

Air Line Pilots Ass'n v. *Quesada*, 276 F.2d 892 (2d Cir. 1960), is even less apposite. That case involved the narrow issue of validity of a rule based on flight safety considerations against pilots flying scheduled aircraft after reaching age 60; there was no amendment of certificate authority in the sense here involved. The licenses originally issued to the pilots specifically provided that their duration was as set out in current regulations. And the Act itself imposes an express duty on the Administrator of the FAA to prescribe reasonable regulations relating to pilot standards. It was thus in a very narrow and limited context that the court held that an adjudicatory hearing was not required for each individual pilot;

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[4] See generally 39 N.Y.U.L. Rev. 347 (1964).

[5] It is relevant to note that the opinion in *National Broadcasting Co.* does not mention the issue before us.

the rule laid down there was made applicable to all pilots, not to certain ones selected by the Board.

Finally, the majority relies on *Capitol Airways* v. *CAB*, 110 U.S.App.D.C. 262, 292 F.2d 755 (1961), which expressly distinguishes cases like the one before us and includes dictum directly on point here, while distinguishing *CAB* v. *American Air Transport, Inc.*, 91 US.App.D.C. 318, 201 F.2d 189 (1952):

> *American Air Transport* . . . involved an effort by the Board to separate the sheep from the goats . . . . This court remanded the case to the District Court to determine whether the Board had in fact changed the terms of existing licenses. The inference to be drawn is that if the Board proposed to discriminate between carriers in the same group, characterizing some as law abiders and some as law breakers, it would be required to afford an evidentiary hearing to those whose operating authority was to be suspended or revoked for cause.
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> In contrast, in the present case the impact of the Board's decision is on an entire class, rather than on particular members of the class who are singled out as law violators or labeled for some reason as unfit or unworthy. Here, the Board has left all competitors in the field, but has redrawn the rules of the game. Some will be easily able to survive under these new rules; some will not. But there is no attempt to adjudicate the merits of individual firms . . . .

110 U.S.App.D.C. at 265, 292 F.2d at 758. (Footnote omitted.) The majority seeks to distinguish the import of this language and the *American Air Transport* case on the ground that here the Board does not accuse petitioners of violating the law. I confess great difficulty in understanding why licensees not accused of violating the law are not as much entitled to an adjudicatory hearing

as licensees who are so accused, when the two are subjected to equivalent Board action. The majority's proposed distinction seems to me to pose substantial problems of equal protection of the laws under the fifth and fourteenth amendments.

Although it is not necessary to discuss the relative desirability of rulemaking and adjudicatory procedures in a situation where Congress has spoken as clearly as it has here, I note that my conclusion as to congressional meaning is reinforced by a consideration of the types of issues involved here. Rulemaking is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class. As pointed out above, however, the CAB's result here is reached by a rule which has different impacts upon members of the same basic category. When the Board makes such a differentiation, the proceedings inescapably become highly adversary in character, especially where the final determination purports to rest upon asserted differences in capabilities and potentialities as between individual carriers. The rulemaking procedure's lack of direct testimony of witnesses, cross-examination, and other features of adjudicatory hearings is totally inadequate for the testing of such competing considerations, both factual and inferential.

While the question whether reduced-rate "blocked-space" service may be offered by *any* carrier might well be appropriate for rulemaking, the selection of particular carriers to provide such service is clearly the sort of question which can be resolved properly and fairly only in an adjudicatory proceeding. Once the Board had decided that it should not allow every freight carrier to offer such service, it was faced with the problem of picking and choosing among competing, mutually exclusive applications. *Cf. Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945). Furthermore, these were not applicants compet-

ing for a *new* right which neither had previously held; they were competing to retain a right which their certificates already authorized. The Board's action made some carriers "more equal" than others.

The majority seems to be trying to suggest, by repeated references to the combination carriers as a "class", that any multiple of one automatically makes a class for these purposes; two seems sufficient to make a "class" of the only domestic all-cargo carriers now certificated. The "formal" procedural safeguards which seem to distress the majority, see pp. 10-14 *supra*, were written into law by Congress precisely because Congress believed that they were necessary in making this crucial kind of determination. A general dissatisfaction with the "rigors" of procedural safeguards should not lead to dispensing with them in a case where they are most appropriate, nor to amending the statute judicially.

While it is not essential to my view of this case, it seems to me of no little significance that the history of all transportation, air, water or land, is that the carriage of bulk freight becomes the dominant and most lucrative business. I see no reason why this is not likely to be true in air carriage.[6] Although passenger carriage is clearly a major and profitable market now, it does not follow that it has the bright prospects for expansion that are open to air freight carriage. History indicates that the future will see a steadily increasing ratio of freight tonnage to passenger tonnage. The Board action here arbitrarily permits one group of favored carriers to preempt much of this lucrative and expanding market by depriving

[6] As the majority itself recognizes, the fact that experience since the order became effective shows "no significant diversion" of cargo from petitioners is a makeweight argument lacking in probative value. Moreover, such off-the-record argument is not properly before us.

equally certificated carriers of part of their duly granted authority. The Board's "Policy Statements" confirm the accuracy of this forecast by declaring that the opportunity to offer reduced blocked-space rates would give the all-cargo carriers "a needed source of financial strengthening," while implying that the combination carriers "can be expected" to suffer no reduction in the amount of air freight they presently carry. Even if the Board has the power to realign so drastically the competitive positions of carriers holding equal certificates, the Act as I read it requires that the Board first hold an evidentiary hearing, before it may make such a certificate amendment.

APPENDIX B

Filed March 2, 1966

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965.

No. 18,833

AMERICAN AIRLINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors.*

No. 18,834

TRANS WORLD AIRLINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors.*

No. 18,840

UNITED AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

THE SLICK CORPORATION,
AIR FREIGHT FORWARDERS ASSOCIATION,
THE FLYING TIGER LINE, INC., *Intervenors.*

On Petitions to Review an Order of the Civil Aeronautics Board.

Before: BAZELON, Chief Judge, and FAHY, WASHINGTON*, DANAHER, BURGER, WRIGHT, MCGOWAN, TAMM and LEVENTHAL, Circuit Judges, sitting *en banc*.

Judgment

These cases came on to be reheard before the court *en banc* on the record from the Civil Aeronautics Board, and were reargued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court *en banc* that the order of the Civil Aeronautics Board on review in these cases is affirmed.

Per Circuit Judge LEVENTHAL

Dated: March 2, 1966

Senior Circuit Judge Washington did not participate in the decision of these cases.

Separate dissenting opinion by Circuit Judge Burger, with whom Circuit Judges Danaher and Tamm join.

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* Circuit Judge Washington became Senior Circuit Judge on November 10, 1965.

APPENDIX C

Order No. E-21170

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 11th day of August, 1964

Docket 15419

Blocked-space air freight tariffs of

AMERICAN AIRLINES, INC.
TRANS WORLD AIRLINES, INC.
UNITED AIR LINES, INC.

Order

The Board, by Order E-21076, of July 17, 1964, suspended and instituted an investigation of the proposed block space tariffs of The Slick Corporation and Trans World Airlines, Inc. Subsequently, by Orders E-21122 dated July 27, 1964 and E-21167 dated August 10, 1964, the Board took similar action with respect to the same type of tariffs filed by American Airlines, Inc., and United Air Lines, Inc., respectively.[1] On August 7, 1964, the Board adopted a Statement of General Policy, Amendment No. 3 to Part 399 of the Board's Regulations. In that regulation we determined that on the basis of policy considerations therein before us, the combination passenger-cargo carriers should not be permitted to offer blocked space service. American, TWA and United are combination carriers as contemplated in this regulation and without authority to provide blocked space service. It follows, in view of this

[1] Order E-21160 dated August 7, 1964 vacating the suspension of the Slick tariff was stayed to and including August 17, 1964, by Order E-21166 dated August 7, 1964.

determination, that the tariffs of American, TWA, and United are inconsistent with the regulations of the Board as well as with the provisions of section 403 of the Federal Aviation Act of 1958. Consequently we will herein reject the block space tariffs of American, TWA, and United as unauthorized by section 403 of the Act and the provisions of the Board's regulations.

The rejection herein of the blocked spaced tariffs of American, TWA, and United removes as an issue in this proceeding the lawfulness of such tariff proposals and we will accordingly dismiss the investigation previously ordered in this docket as to the blocked space tariffs of these carriers.[2] However, for the reasons heretofore stated in Order E-21076 of July 17, 1964, the investigation of the lawfulness of the Slick blocked space tariff proposal is necessary, and the processing of that matter will continue unaffected by any action taken herein.

Accordingly, pursuant to the Federal Aviation Act of 1958, and particularly sections 102, 204(a), and 403, thereof,

IT IS ORDERED THAT:

1. The following tariffs and revised pages are hereby rejected:

(a) American Airlines, Inc. Tariff C.A.B. No. 166;

(b) Trans World Airlines, Inc. Tariff C.A.B. No. 125;

(c) Agent J. Aniello's Tariff C.A.B. No. 28;

(d) 10th and 11th Revised Pages 18 of Agent J. Aniello's Tariff C.A.B. No. 13.

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[2] Under our statement of general policy of August 7, 1964, blocked space services may be provided by all-cargo carriers and the blocked space tariff filed by Slick, an all-cargo carrier is properly fileable under section 403 of the act and the Board's regulations.

2. The investigation instituted by ordering paragraphs 1 of Orders E-21076, E-21122, and E-21167, insofar as they are applicable to blocked spaced tariffs of American Airlines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc., is dismissed.

3. Copies of this order shall be filed with the tariffs and served upon all parties to this proceeding.

4. This order shall be effective August 11, 1964.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

GURNEY and GILLILLAND, Members, Dissenting:

We cannot agree for the reasons stated in the dissent attached to Order E-21160, August 7, 1964 that the blocked-space tariffs filed by the combination carriers be rejected. All of the blocked-space tariffs should be suspended and investigated to determine their lawfulness.

Furthermore, for the reasons stated in the dissent attached to Part 399, Amendment 3, August 7, 1964, we cannot agree that the Board can legally preclude the combination carriers from offering competitive blocked-space service.

/s/ CHAN GURNEY
/s/ WHITNEY GILLILLAND

APPENDIX D

A. The Following Provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as Amended, 49 U.S.C. § 1301 et seq., Are Principally Involved:

Sec. 101 [72 Stat. 737, *as amended*, 49 U.S.C. § 1301].

DEFINITIONS

As used in this chapter, unless the context otherwise requires—

* * *

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

* * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * *

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof;

or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Sec. 102 [72 Stat. 740, 49 U.S.C. § 1302].

CONSIDERATION OF MATTERS IN PUBLIC INTEREST BY BOARD

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

* * *

Sec. 204 [72 Stat. 743, 49 U.S.C. § 1324].

GENERAL POWERS AND DUTIES OF THE BOARD

(a) Performance of acts; conduct of investigations; orders, rules, regulations, and procedure.

The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this chapter.

* * *

Sec. 401 [72 Stat. 754, *as amended,* 49 U.S.C. § 1371].

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

(a) Essentiality.

No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board

authorizing such air carrier to engage in such transportation.

* * *

(c) Notice of application; filing of protest or memorandum; hearing.

Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing; and the Board shall dispose of such application as speedily as possible.

(d) Issuance.

(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder.

* * *

(e) Terms, conditions, and limitations.

(1) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

* * *

(4) No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require; except that the Board may impose such terms, conditions, or limitations in a certificate for supplemental air transportation when required by subsection (d)(3) of this section.

* * *

(6) Any air carrier, other than a supplemental air carrier, may perform charter trips or any other special service, without regard to the points named in its certificate, or the type of service provided therein, under regulations prescribed by the Board.

(f) Effective date and duration.

Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d)(2) of this section shall continue in effect until the expiration thereof, unless, prior to the date of expiration such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased:

Provided, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

(g) Alteration, amendment, modification, suspension, or revocation.

The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this sub-chapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

* * *

Sec. 403 [72 Stat. 758, *as amended*, 49 U.S.C. § 1373].

TARIFFS OF AIR CARRIERS

(a) Filing, posting, and publication; rejection of tariffs.

Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public in-

spection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

(b) Observance of tariffs; granting of rebates.

No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. Nothing in this chapter shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe,

from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any air carrier or foreign air carrier), the parents and immediate families of such officers and employees, and the immediate families of such directors; widows, widowers, and minor children of employees who have died as a direct result of personal injury sustained while in the performance of duty in the service of such air carrier or foreign air carrier; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; immediate families, including parents, of persons injured or killed in aircraft accidents where the object is to transport such persons in connection with such accident; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe. Any air carrier or foreign air carrier, under such terms and conditions as the Board may prescribe, may grant reduced-rate transportation to ministers of religion on a space-available basis.

(c) Notice of change in tariff.

No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Board may in the public interest, by

regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(d) Filing of divisions of rates and charges.

Every air carrier or foreign air carrier shall keep currently on file with the Board, if the Board so requires, the established divisions of all joint rates, fares, and charges for air transportation in which such air carrier or foreign air carrier participates.

Sec. 404 [72 Stat. 760, 49 U.S.C. § 1374].

RATES FOR CARRIAGE OF PERSONS AND PROPERTY; DUTY TO PROVIDE SERVICE, RATES, AND DIVISIONS; DISCRIMINATION.

(a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality,

or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * *

Sec. 412 [72 Stat. 770, 49 U.S.C. § 1382].

POOLING AND OTHER AGREEMENTS; FILING; APPROVAL BY BOARD.

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing

the compensation to be received by such common carrier for transportation services performed by it.

* * *

Sec. 416 [72 Stat. 771, 49 U.S.C. § 1386].

CLASSIFICATION AND EXEMPTION OF CARRIERS.

(a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this subchapter as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this subchapter, to be observed by each such class or group, as the Board finds necessary in the public interest.

(b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this subchapter or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this subchapter or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

* * *

Sec. 1002 [72 Stat. 788, 49 U.S.C. § 1482].

COMPLAINTS TO AND INVESTIGATIONS BY THE ADMINISTRATOR AND THE BOARD.

* * *

(c) Entry of orders for compliance with chapter.

If the Administrator or the Board finds, after notice and hearing, in any investigation instituted upon com-

plaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this chapter or any requirement established pursuant thereto, the Administrator or the Board shall issue an appropriate order to compel such person to comply therewith.

(d) Power to prescribe rates and practices of air carriers.

Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: *Provided*, That as to rates, fares, and charges for overseas air transportation, the Board shall determine and prescribe only a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge.

(e) Rule of rate making.

In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air

carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

* * *

(g) Suspension of rates.

Whenever any air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers) rate, fare, or charge for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or other formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, the Board, by filing with such tariff, and delivering to the air carrier affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, for a period of ninety days, and, if the proceeding has not been concluded and a final order made within such period, the Board may, from time to time, extend the period of suspension, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when such tariff would otherwise go into effect;

and, after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, rule, regulation, or practice shall go into effect at the end of such period: *Provided*, That this subsection shall not apply to any initial tariff filed by any air carrier.

* * *

B. The Following Provisions of the Administrative Procedure Act, 60 Stat. 237 (1946), as Amended, 5 U.S.C. § 1001 et seq., Are Principally Involved:

Sec. 2 [60 Stat. 237, *as amended*, 5 U.S.C. § 1001].

DEFINITIONS

As used in this chapter—

* * *

(c) Rule and rule making.

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) Order and adjudication.

"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) License and licensing.

"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

* * *

Sec. 4 [60 Stat. 238, 5 U.S.C. § 1003].

RULE MAKING

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice; publication and contents.

General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall

not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.

After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

(c) Time of publication or service of rules.

The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions.

Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

C. The Board's Statement of General Policy on Blocked Space Service, 14 C.F.R. § 399.37, Reads as Follows:

§ 399.37 *Blocked Space Service.*

(a) As used in this statement:

(1) "All-cargo carrier" means an air carrier holding a certificate of public convenience and necessity issued pursuant to Section 401(d)(1) or (2) of the Federal Aviation Act of 1958 which authorizes the carriage of property only or of property and mail only.

(2) "Blocked space service" means the carriage of property in all-cargo aircraft at wholesale rates pursuant to an effective tariff stating a rate applicable only when the user reserves and agrees to pay for a specified amount of space or lift on a regular recurring basis for a period not less than 60 days.

(3) "Combination carrier" means an air carrier holding a certificate of public convenience and necessity issued pursuant to Section 401(d)(1) and (2) of the Act which authorizes the carriage of persons, property and mail or persons and property only.

(b) It is the policy of the Board to permit all-cargo carriers to provide blocked space service to (1) such combination carriers as may choose to use it to provide service over routes which are certificated to both the combination and the all-cargo carrier involved; (2) air freight forwarders; and (3) large volume individual shippers.

(c) It is the policy of the Board not to permit combination carriers to provide blocked space service.